Supreme Court, U.S.
FILED

No. 04- 031528 MAR 10 2004

OFFICE OF THE

IN THE

Supreme Court of the United States

GARFIELD PHILLIPS,

Petitioner,

vs.

JOHN MEZERA, ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARFIELD PHILLIPS
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March 10, 2004

QUESTIONS PRESENTED

The City of Joliet's issued Notice of Emergency Condemnation contains Appeal provisions which enables a property owner to seek review, modification or withdraw of the condemning of their property for being cited as unfit for human habitation. If timely filed, the Notice of Appeal affords the property owner the right to be accorded a post deprivation administrative hearing. The Illinois Complied Statutes, as well as the Code of Ordinances for the City of Joliet contains provisions requiring a municipality to apply to the Circuit Court of the County in order to acquire authorization to carry out some form of punitive action against a property owner who fails to abate a cited property nuisance after receiving a written notice to do so. Paragraph 2 of 65 ILCS 5/11-31-1(a) along with Section 20-6 of the Code of Ordinances of the City of Joliet affords a property owner the right to be accorded with a post deprivation judicial proceeding. Neither does Paragraph 2 of 65 ILCS 5/11 -31-1(a), nor does Section 20-6 of the Code of Ordinances of the City of Joliet provide an exemption for Respondent City to initiate any form of punitive action against a property owner for alleged ordinance violations before acquiring Court authorization.

1. Contrasting Federal Court Decisions.

2. Whether Respondent City's failure to accord Petitioner with the full and equal benefit of a Section 20-6 post judicial proceedings deprived Petitioner of due process of law as guaranteed under the Fourteenth Amendment of the Constitution of the United States?

3. Whether the district court's dismissal of Counts III, IV & V of Petitioner's Second Amended Complaint and decision to grant Summary Judgement on Counts I & II of Petitioner's Second Amended Complaint was improper as a matter of law?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Garfield Phillips, an African American citizen of the State of Illinois and a resident of the City of Joliet/Will County. Petitioner Phillips was a Petitioner in the United States Court of Appeals for the Seventh Circuit. He is the former owner of the real property known as 26-28 Union Street, Joliet, Illinois, (the "Property") and the former holder of the transferred 10 years U.S. Dept. of Housing and Urban Development Moderate Rehabilitation Housing Section 8 Contract (the "Contract") with the Housing Authority of Joliet and the former holder of a transferred 4 year Certificate of Inspection for the real property known as 26-28 Union Street, Joliet, Illinois. He has also represented himself at several district court proceedings, and is currently appealing the affirming of the district court's dismissal of his Section 1981(a) interference with rights to enforce contract and deprivation of full and equal benefit of all laws and proceeding for the security of property claim; Section 1982 deprivation of right to hold and lease real property claim; Section 1983's deprivation of rights under Fourteenth Amendment claim and common law Negligence claim, as set forth in his Second Amended Complaint (R.Doc. 23).

Respondents in this case are John Mezera, City Manager for the City of Joliet; James Shappard, Deputy City Manager for the City of Joliet; Joyce Toso, Building Maintenance Coordinator for the City of Joliet; Mary J. Kucharz, Assistant Corporation Counsel for the City of Joliet and the City of Joliet, a municipal corporation organized and existing under the Laws of the State of Illinois and located in the County of Will.

TABLE OF CONTENTS

PAGE

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Constitutional & Statutory Provisions 2

Statement of Jurisdiction 5

Statement of the Case 6

Introduction 13

Reasons for Granting the Writ 14

I. Contrasting Federal Court Decisions 16

II. Whether Respondent City's failure to accord Petitioner with the full and equal benefit of a Section 20-6 post deprivation judicial proceedings deprived Petitioner of due process of law as guaranteed under the Fourteenth Amendment of the Constitution for the United States? 20

III. Whether the district court's dismissal of Counts III, IV & V of Petitioner's Second Amended Complaint and the decision to grant Summary Judgement on Counts I & II of Petitioner's Second Amended Complaint was improper as a matter of law? 24

Conclusion 30

TABLE OF CITED AUTHORITIES

PAGE

Cases:

Anderson v. Liberty Lobby,
477 U.S. 242, 106 S.Ct. 2505 (1986) 14, 18, 28

Blumenthal v. Murray,
995 F.Supp. 831 (N.D. Ill. 1998) 14, 16

Bordelon v. Chicago School Reform Board of Trustees,
8 F.Supp.2d 779 (N.D. Ill. 1998) 14, 16, 21, 25

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548 (1986) 15, 18, 26, 28

Chicago School Reform Board of Trustees v. Substance Inc.,
79 F.Supp.2d 919 (N.D. Ill. 2000) 14, 16, 21

County of Sacramento v. Lewis
118 S.Ct. 1708 (1988) 22

Harding v. Edward J. Rosewell,
22 F.Supp.2d 806 (N.D. Ill. 1998) 14, 18

Kentucky v. Graham, Ky.,
473 U.S. 159, 87 L.Ed.2d 114, on remand 791 F2d 932
105 S.Ct. 3099 (1985) 14, 17, 26

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574, 586 (1986) 14, 28

McKenzie v. City of Chicago,
968 F.Supp. 1268 (N.D. Ill. 1997) 14, 16, 21

Murray v. Amoco Oil Co.,
539 F.2d 1385 (C.A.5th 1976) 14, 24

N & N Catering Company, Inc. v. City of Chicago,
26 F.Supp.2d 1067 (N.D. Ill. 1998) 14, 17, 21

Peck v. Hoff,
C.A.8th, 660 F.2d 371, 374 (1991) 24

Qvyjt v. Dr. Chhiu-Tsu Lin,
932 F.Supp. 1100 (N.D. Ill. 1996) 14, 17, 21

Sisters of Providence of St. Mary of Wood v. City of Evanston,
355 F.Supp. 396 (N.D. Ill.) 14, 18, 28

West v. Atkins,
108 S.Ct. 2250, 487 U.S. 101 L.Ed.2d 40 (1988) 14, 25

Statutes:

United States Constitution
Amendment 14, Section 1 . . . . . passim
42 U.S.C. Section 1981(a) 3, 8, 10, 18
42 U.S.C. Section 1982 . . . . . 3, 8, 10, 18
42 U.S.C. Section 1983 . . . . . 4, 8, 16, 21

Other Authorities:

Paragraph 4 of the Notice of Emergency Condemnation
for the City of Joliet 2, 9, 20
65 ILCS 5/11-31-1(a) 2, 13
Section 20-6 of the Code Ordinances
for the City of Joliet 3, 9, 13, 20, 22, 25, 29

Rule:

F.R.Civ. P. Rule 12(b)(6) 4, 8, 9, 12, 24
F.R.Civ.P. 56(c) 4, 8, 9, 27
LR56.1(a)(3)(A)(B) 4, 10, 27, 28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Garfield Phillips respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in case 03-1068 and to review the decisions of the United States District Court for the Northern District of Illinois in case 00 C 3348.

OPINIONS BELOW

This Petition is being filed in this case by Petitioner proceeding in *Pro se*. The Petition contains what will be a joint Appendix in this case, which will be referred to as "A-". The Unpublished Order of December 11, 2003 will be referred to as the First Order at page # 9. The Memorandum Opinion and Order of November 25, 2002 will be referred to as the Second Order at page #10 . The Memorandum Opinion and Order of October 31, 2001 will be referred to as the Third Order at page # 11. The December 11, 2003 issued Unpublished Order of the United States Court of Appeals for the Seventh Circuit is reported as Garfield Phillips vs. John Mezera No. 03-1068 reproduced herein at A-1. The Memorandum Opinions and Orders of November 25, 2002 reproduced herein as A-3 and the Memorandum Opinion and Order of October 31, 2001 reproduced herein as A-23 are reported as Garfield Phillips vs. John Mezera, et. al., No. 00 C 3348.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Paragraph 4, of the City of Joliet issued Notice of Emergency Condemnation, provides: "You as owner or recipient of this notice shall have the right to seek review, modification or withdraw by filing a written Notice of Appeal with the City Manager within 72 hours of receipt of this notice. This notice shall be final and non-appealable if you have not sought review, modification or withdraw of this order within the 72 hours of receipt of this notice.

Paragraph 2 of 65 ILCS 5/11-31-1(a), provides: "The corporation authorities shall apply to the circuit court of the county in which the building is located (i) for an order authorizing action to be taken with respect to a building if the owner or owners of the building, including the lien holder of record, after at least 15 days written notice by mail to do so, have failed to put the building in a safe condition or to demolish it or (ii) for an order requiring the owner or owner of record to demolish, repair, or enclose the building or to remove garbage, debris, and other hazardous, noxious, or unhealthy substance or materials from the building."

Section 20-6 of the Code of Ordinances for the City of Joliet provides: "In the event the person upon whom notice has been served pursuant to this chapter has failed within the prescribed time to abate the nuisance, then the person who served notice or the citizen of the city who filed an affidavit with the department of community development asking that a nuisance be abated, shall file a complaint charging a violation of this division with the Circuit Court of the Twelfth Judicial Circuit or a magistrate thereof and demanding that the person upon whom notice was served be punished as provided in this chapter."

Title 42 U.S.C. Section 1981(a) provides, in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, . . , and to the full and equal benefits of all laws and proceedings for the security of . . . . property as is enjoyed by white citizens, ... "

Title 42 U.S.C. Section 1982 provides, in relevant part: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens there of to . . . . . lease, . . . , hold, ... real and personal property."

Title 42 U.S.C. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

F.R.Civ.P. Rule 12(b)(6) provides, in relevant part: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . . . (6) failure to state a claim upon which relief can be granted."

F.R.Civ.P. Rule 56(c) provides: "The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law.

LR56.1(a)(3)(A)(B) provides: "With each motion for summary judgement filed pursuant to Fed.R.Civ.P. 56, the moving party shall serve and file: (3) a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgement as a matter of law, and that also includes: (A) description of the parties, and (B) all the facts supporting venue and jurisdiction in this Court.

The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific reference to the affidavit, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion.

If additional material facts are submitted by the opposing party pursuant to section (b), the moving party may submit a concise reply in the form prescribed in that section for a response. All material facts set forth in the statement filed pursuant to section (b)(3)(B) will be deemed admitted unless controverted by the statement of the moving party."

STATEMENT OF JURISDICTION

On December 11, 2003, the United States Court of Appeals for the Seventh Circuit issued its Unpublished Order that affirmed the District Court's October 31, 2001 issued Memorandum Opinion and Order granting the defendants' FRCP Rule 12(b)(6) Motion to Dismiss on Counts III & IV Section 1983 claims and on Count V common law Negligence claim of Plaintiff's Second Amended Complaint, and affirmed the District Court's November 25, 2002 issued Memorandum Opinion and Order which granted Summary Judgement in favor of the Defendants and against the Plaintiff on Count I Section 1981(a) claims and on Count II Section 1982 claims of Plaintiff's Second Amended Complaint. The instant Petition is filed within 90 days of that decision, pursuant to Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On the 2nd day of March, 1998, during the annual inspection of the 28 Union Street's Section 8 rental unit of Petitioner Phillips' former 26-28 Union Street property. Housing Authority of Joliet Building Inspector, Augie Juricic, determined that the 28 Union Street unit was fit for human habitation and re-approved Petitioner Phillips' U.S. Department of HUD Moderate Rehabilitation Section 8 Housing Contract with the Housing Authority of Joliet (R.Doc. 69, Exhibit E).

On the 5th day of May, 1998, Respondent Toso issued a Notice of Property Maintenance Code Violations to Petitioner Phillips based upon a April 30, 1998 inspection of his former 26-28 Union Street property. The 28 Union Street unit was cited for three (3) minor code violations (R.Doc. 69, Exhibit F).

On June 3, 1998, Respondent City unwarrantedly disrupted water services to Petitioner Phillips' former 26-28 Union Street property and Respondent City's Police Officers made several trips to the "Property" informing the tenants that they had to move out of the "Property".

On the 5th day of June, 1998, Petitioner Phillips was separately informed by Respondent Toso and Housing Authority of Joliet's Section 8 Housing Coordinator, Joyce Johnson, that Respondent City wanted the tenants occupying the 26 Union Street rental unit out of the area because Respondent City felt that they were a nuisance to Respondent City.

On the 6th day of June 1998, Petitioner Phillips and his former 26-28 Union Street property tenants received Respondent Toso's June 4, 1998 issued Notice of Emergency Condemnation and Notice To Vacate Unsafe Property.

The Notice of Emergency Condemnation contained Appeal provisions for seeking review, modification or withdraw of the June 4, 1998 issued Notices (R.Doc. 69, Exhibit I).

On or about the 6th day of June, 1998, one of Respondent City's Neighborhood Services Inspector made a couple of trips to the 26-28 Union Street property informing the tenants about the limited amount of time that they had to vacate the property because Respondent City was going to board up the building and change the entrance door locks (R.Doc. 70 Exhibits L & M).

On or about the 8th day of June, 1998, Petitioner Phillips submitted a Notice of Appeal to Respondent Shapard which sought an administrative hearing on the June 6, 1998 received Notice of Emergency Condemnation (R.Doc. 70, Exhibit M), and on the very same day Respondent Mezera authorized the faxing of Respondent Toso's June 4, 1998 issued Notice to the Housing Authority of Joliet (R.Doc. 23, Exhibit F & R.Doc. 83 Exhibit A).

On or about the 11th day of June, 1998, Respondent Kucharz contacted Petitioner Phillips at his place of employment and informed him that a hearing would be set up upon Respondent Mezera returning from being out of town (R.Doc. 70, Exhibit N)

Without having had accorded Petitioner Phillips with his Requested Administrative Hearing for seeking the withdraw of Respondent Toso's June 4, 1998 issued Notice of Emergency Condemnation. Respondent City dispatched members of its Police Department whose officers forcible evicted the tenants from the "Property" as well as removed the locks from the front and back door entrances and replaced the original door locks with Respondent City's padlocks.

On or about the 10th day of July, 1998, Housing Authority of Joliet Section 8 Coordinator, Joyce Johnson, issued a notice to

Petitioner Phillips concerning the termination of his March 2, 1998 renewed Moderate Rehabilitation Housing Section 8 Contract. The notice indicated that the contract termination was based upon having had received documentation from Respondent City (R.Doc. 70, Exhibit P).

Petitioner Phillips initiated Federal Court judicial proceedings claiming Title 42 U.S.C. Section 1981(a) interference with right to enforce contract and deprivation of the full and equal benefits of all laws and proceedings for the security of property; Title 42 U.S.C. Section 1982 deprivation of right to lease and hold property; Title 42 U.S.C. Section 1983 deprivation of Fourteenth Amendment rights to due process of law.

On or about the 31st day of October, 2001, the district court granted Respondent City's FRCP Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted, dismissing the two Section 1983 claims and the common law Negligence Counts of Petitioner Phillips' Second Amended Complaint with prejudice. The Rule 12(b)(6) Motion was granted based upon Respondent City's claim that based upon its status as a home-rule municipality pursuant to Article VII of the Illinois Constitution, they were not required to adhere to state law contrary to local ordinances and that Respondent City was not required to obtain a court order to "condemn" Petitioner Phillips' 26-28 Union Street rental property (A-23).

On or about the 25th day of November, 2002, the district court granted a FRCP Rule 56(c) Motion for Summary Judgement in favor of the Respondents and against Petitioner Phillips, dismissing the Section 1981(a) and Section 1982 claims. The allowing of the Rule 56(c) Motion was based upon the district court claiming that Petitioner Phillips failed to meet his burden of proving a prima facie case of racial discrimination

and that Petitioner Phillips had not demonstrated that Joliet officials accorded more favorable treatment to similarly situated white property owners (A-3).

In issuing its Unpublished Order (First Order), the three panel judges of the Court of Appeal for the Seventh Circuit did not address whether the district court applied the correct analysis test toward making the determination to allow Respondent City's FRCP Rule 12(b)(6) Motion to Dismiss and Respondent City's FRCP Rule 56(c) Motion for Summary Judgement. The First Order did not address whether or not Respondent City was legally obligated to accord Petitioner Phillips with the due process of a post deprivation administrative hearing on his June 8, 1998 timely filed Notice of Appeal and whether or not Respondent City was legally obligated to accord Petitioner Phillips with the due process of a Section 20-6 post deprivation judicial proceeding as customarily accorded to other similarly situated white rental property owners. The First Order did not address whether or not Respondent Mezera's method of effectuating the termination of Petitioner Phillips' March 2, 1998 renewed U.S. Department of HUD Moderate Rehabilitation Housing Section 8 Contract with the Housing Authority of Joliet, represented an interference with Petitioner Phillips' rights to enforce his March 2, 1998 renewed U.S. Department of HUD Moderate Rehabilitation Section 8 Housing Contract.

The decision of the three panel judges of the Court of Appeals for the Seventh Circuit did not include any discussion revolving around what process Petitioner Phillips was due either under paragraph 4 of Respondent Toso's June 4, 1998 issued Notice of Emergency Condemnation for the City of Joliet, or under Section 20-6 of the Code of Ordinances of the City of Joliet.

On November 25, 2002, the district court, in issuing its Memorandum Opinion and Order ("Second Order") dismissing Count I Section 1981(a) claim & Count II Section 1982 claim of Petitioner's Second Amended Complaint (A-3), did not address Petitioner's LR56.1(b)(3) Response Opposing the Respondents' Motion for Summary Judgement contention concerning how the failure on the part of Respondent City's Statement of Material Facts to comply with the mandatory pleading requirements of LR56.1(a)(3)(A)(B) did not entitle Respondent City to Summary Judgement either on Count I Section 1981(a) claim or on Count II Section 1982 claim of the Second Amended Complaint (R.Doc. 68). Rather, the district court arrived at its determination by contrast comparison between the pleadings set forth in Respondent City's improperly pled LR56.1(a)(3)(A)(B) Statement of Material Facts and the unauthorized filed Additional Statement of Material Facts (R.Doc. 58 & R.Doc. 78) and selected pleadings set forth in Petitioner Phillips' properly pled LR56(a)(3)(B) Statement of Additional Material Facts (R.Doc. 69 & 70). The Second Order did not address Respondent City failure to disprove Petitioner's contention and evidence concerning Respondent Mezera authorizing the June 8, 1998 faxing of a copy of Respondent Toso's June 4, 1998 issued Notice of Condemnation to the Housing Authority of Joliet (R.Doc. 83, Exhibit A; R.Doc. 23, Exhibit F) that directly effectuated the Housing Authority of Joliet's July 10, 1998 issued decision to terminate Petitioner's March 2, 1998 renewed Section 8 Contract for the unit at 28 Union Street (R.Doc. 70, Exhibit P) and deprived Petitioner Phillips of his right to enforce his March 2, 1998 re-newed U.S. Dept. of HUD Moderate Rehabilitation Section 8 Housing Contract (R.Doc. 69, Exhibit E). The Second Order did not address Respondent

City's failure to disprove Petitioner's contention that unlike the contract interference imposed upon Petitioner Phillips. After James Wyatt continuously failed to appear at scheduled property inspection, failed to timely pay inspection fees and failed to abated cited nuisances at his various rental properties after having had been provided with numerous written notices to so and after having had been provided with numerous pre-deprivation proceedings, as well as was provided with numerous post-deprivation judicial proceedings (R.Doc. 69, page 9, paragraph 20 & Exhibit K1). Respondent Mezera did not take the initiative to authorize the faxing of documentation to the Housing Authority of Joliet's Section 8 Coordinator to effectuate terminating any of white rental property owner, James Wyatt's U.S. Dept. of HUD Moderate Rehabilitation Housing Section 8 Contracts with the Housing Authority of Joliet. The Second Order evaded addressing whether or not Respondent City failure to accord Petitioner Phillips with the due process of Section 20-6 post deprivation judicial proceedings while according the due process of Section 20-6 post deprivation judicial proceedings to several other similarly situated white rental property owners whom had repeatedly failed to abate property nuisances after having had received numerous pre-deprivation hearings, as well as had repeatedly failed to make themselves available to allow inspections, failed to timely pay inspection fees and repeated failure to abated building code violations after being served with numerous notices to do so (R.Doc. 70, Exhibits K1 – K4), constituted discrimination.

On October 31, 2001, in issuing its Memorandum Opinion and Order ("Third Order"), granting Respondent City's Motion to Dismiss Petitioner Phillips' Second Amended

Complaint pursuant to FRCP Rule 12(b)(6), dismissing Counts III & IV Section 1983's Fourteenth Amendment claim & Count V common law Negligence claim with prejudice. In making its determination to dismiss Count III, IV & V of Petitioner Phillips' Second Amended Complaint. The district court did not utilize the analysis test set forth in the Federal Practice and Procedure governing Rule 12(b)(6) motions for evaluating the formal sufficiency of a statement of claim under Title 42 U.S.C. Section 1983 and common law Negligence, as argued in Petitioner Phillips' Response Argument against Respondent City's FRCP Rule 12(b)(6) Motion to Dismiss (**See R.Doc. 27**). The Third Order equally did not address what form of due process that Plaintiff Phillips was entitled to under the "Policy" of paragraph 4 of Respondent City's Notice of Emergency Condemnation (R.Doc. 69, Exhibit I) and under the "Ordinance" of Section 20-6 of the Code of Ordinances for the City of Joliet (R.Doc. 69 "Exhibit C").

Petitioner Phillips challenged the district court's issued Memorandum Opinions and Orders of October 31, 2001 and November 25, 2002 on a number of grounds. Petitioner Phillips' Appeal Brief pleadings set forth uncontroverted facts and relevant legal arguments supportive of his contentions that the district court's deviation from utilizing the proper analysis test of FRCP Rule 12(b)(6) for evaluating a statement of claim brought forth pursuant to Title 42 U.S.C. Section 1983 and common law Negligence, as well as the district court deviation from utilizing the proper analysis test of FRCP Rule 56(c) for determining a Motion for Summary Judgement, rendered determinations that were improper as a matter of law.

INTRODUCTION

The Legislative branch of the State of Illinois enacted 65 ILCS 5/11-31-1(a), for the purpose to provide a municipality with a means to acquire Circuit Court authorization to carry out some form of punitive action against a property owner's failure to abate a cited property nuisance within a particular quantity of time after being served with notice to do so. The City of Joliet's adoption of Section 20-6 of the Code of Ordinances represent a mirror reflection of the provisions set forth in 65 ILCS 5/11-31-1(a). The district court's Memorandum Opinions and Orders of October 31, 2001 and November 25, 2002, as well as the U.S. Court of Appeals for the Seventh Circuit's subsequent affirmation did not address what type of process that the Petitioner was entitled to in order to protect his property interest, as well as for protecting his March 2, 1998 renewed U.S. Dept. of HUD Moderate Rehabilitation Section 8 Contract with the Housing Authority of Joliet. Therefore, this case presents an important procedural issue and a question of law that requires resolution by this court.

The Petition challenges Respondent City's failure to accord Petitioner Phillips with a post deprivation administrative hearing and failure to accord Petitioner Phillips with a post-deprivation judicial proceeding and for Respondent Mezera's interference with Petitioner Phillips' right to enforce contract with the Housing Authority of Joliet. The Petition seeks review of the improperly applied opinions on due process and summary judgement created by the district court decisions of October 31, 2001 and November 25, 2002, and the court of appeals decision of December 11, 2003, which conflicts with other decisions rendered by courts of the Seventh Circuit and various decisions rendered by this Court.

REASON FOR GRANTING WRIT

The district court and the court of appeals rendered decisions upholding Respondent City's deprivation of due process of law and equal protection of the laws and interference with contractual relationships. Those decisions, however, are in conflict with the decisions of the U.S. District Court N.D., as well as is in conflict with decisions of other district courts and this court's analysis test for evaluating the formal sufficiency of Section 1983 deprivation of rights claims under the 14th Amendment of the Constitution for the United States and the analysis test for allowing summary judgement. See *Blumenthal v. Murray,* 995 F.Supp. 831 (N.D. Ill. 1998); *Bordelon v. Chicago School Reform Board of Trustees,* 8 F.Supp.831 (N.D. 1998); *Chicago School Reform Board of Trustees v. Substance Inc.,* 79 F.Supp.2d 919 (N.D. 2000); *Kentucky v. Graham, Ky.,* 473 U.S. 159, 87 L.Ed.2d 114, on remand 791 F2d 932 105 S.Ct. 3099 (1985); *McKenzie v. City of Chicago,* 968 F .Supp. 1268 (N.D. Ill. 1997); *Murray v. Amoco Oil Co.,* 539 F.2d 1385 (C.A.5th 1976); *N & N Catering Company, Inc. v. City of Chicago,* 26 F.Supp.2d 1067 (N.D. Ill. 1998); *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct.2505 (1986); *Harding v. Edward J. Rosewell,* 22 F.Supp.2d 806 (N.D. Ill. 1998); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *Qvyjt v. Dr. Chhiu-Tsu Lin,* 932 F.Supp. 1100 (N.D. Ill. 1996); *Sisters of Providence of St. Mary of Wood v. City of Evanston,* 355 F.Supp. 396 (N.D. Ill. 1971); *West v. Atkins,* 108 S.Ct. 2250, 487 U.S. 42 101 L.Ed.2d 40 (1988). Because of those conflicts the writ ought to be granted.

Moreover, the court of appeals' Unpublished Order is in conflict with the factually indistinguished decisions of *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct. 2505 (1986); *Blumenthal v. Murray,* 995 F.Supp. 831

(N.D. Ill. 1998); *Bordelon v. Chicago School Reform Board of Trustees,* 8 F.Supp.2d 779 (N.D. Ill. 1998) *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986); *Chicago School Reform Board of Trustees v. Substance Inc.,* 79 F.Supp.2d 919 (N.D. Ill. 2000); *Harding v. Edward J. Rosewell,* 22 F.Supp.2d 806 (N.D. Ill. 1998); *Kentucky v. Graham, Ky.,* 473 U.S. 159, 87 L.Ed.2d 114, on remand 791 F2d 932,105 S.Ct. 3099 (1985); *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *McKenzie v. City of Chicago,* 968 F.Supp. 1268 (N.D. Ill. 1997); *Murray v. Amoco Oil Co.,* C.A.5th 539 F.2d 1385 (1976); *N & N Catering Company, Inc. v. City of Chicago,* 26 F.Supp.2d 1067 (N.D. Ill.1998); *Peck v. Hoff,* 660 F.2d 371, 374 (1991); *Qvyjt v. Dr. Chhiu-Tsu Lin,* 932 F.Supp. 1100 (N.D. Ill. 1996); *Sisters of Providence of St. Mary of Wood v. City of Evanston,* 355 F.Supp. 396 (N.D.Ill. 1971) and *West v. Atkins,* 108 S.Ct. 2250, 487 U.S. 42 101 L.Ed.2d 40 (1988), cases the existence of which the court of appeals' Unpublished Order of December 11, 2003, does not even acknowledge.

Certiorari should be granted because the district court and the court of appeals in this matter has left courts in the Seventh Circuit with no guidance on how to determine deprivation of due process and with no guidance on the proper analysis test to be applied toward evaluating a Motion brought forth pursuant to FRCP Rule 12(b)(6) and a Motion brought forth pursuant to FRCP Rule 56(c) and LR56.1(a)(3)(A)(B). The writ ought to be granted to lend such guidance, as well as to vacate improvident decisions.

I. Contrasting Federal Court Decisions

The district court's Memorandum Opinion and Order of October 3, 2001, as well as the court of appeals' Unpublished Order of December 11, 2002 addressing Petitioner Phillips' Section 1983 deprivation of due process claims are arguably inconsistent with the Northern District's analysis test in *Blumenthal v. Murray,* 995 F.Supp. 831 (N.D. Ill. 1998). There the court recognized that "to satisfy Section 1983 claim, plaintiff must allege violation of a right secured by Constitution and laws of United State, and must show that alleged violation was committed by person action under color of state law." *14.

As well as is arguably inconsistent with this Court's analysis test in *Bordelon v. Chicago School Reform Board of Trustees,* 8 F.Supp.2d 779. There this court recognized that; "In ascertaining the nature and boundaries of the property interest protected for the purpose of due process analysis, the court must look to the instrument which creates the interest asserted." *5

As well as is arguably inconsistent with the Northern District's analysis test in *Chicago School Reform Board of Trustees v. Substance Inc.*79 F.Supp.2d 919 (N.D. Ill. 2000). There the court recognized that "Constitutional due process guarantee protects not only against denials of fundamental procedural fairness but also against exercise of power without reasonable justification in service to legitimate governmental objective." *3

As well as is arguably inconsistent with the Northern District's analysis test in *McKenzie v. City of Chicago,* 968 F.Supp. 1268 (N.D. Ill. 1997). The court recognized that; "Adversary hearings before neutral third party may be even more essential to guarantee procedural due process when government has direct pecuniary or political interest" *8

Also, purpose of requirement of notice and hearing under due process clause of the Fourteenth Amendment is not only to ensure abstract fair play to the individual but is more particularly to protect his use and possession of property from arbitrary encroachment, and to minimize substantively unfair and mistaken deprivation of property."*9

As well as is arguably inconsistent with this Court's analysis test in *Kentucky v. Graham, Ky.,* 105 S.Ct. 3099, 473 U.S. 159, 87 L.Ed.2d 114, on remand 791 F2d 932 (1985). There this court held that; "On the merit, to establish personal liability of a public official in a Section 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right, but more is required in an official-capacity action, for the governmental entity is liable under Section 1983 only when the entity itself is a *"moving force"* behind the deprivation."

As well as is arguably inconsistent with the Northern District's analysis test in *N & N Catering Company, Inc.,* 26 F.Supp.2d 1067 (N.D. Ill. 1998). There the court held that; "Procedural due process claims under the Fourteenth Amendment, brought pursuant to Section 1983, requires a court to first determine whether plaintiff has been deprived of a protected interest, and second, what process is due." *4

As well as is arguably inconsistent with the Northern District's analysis test in *Qvyjt v. Dr. Chhiu-Tsu Lin,* 932 F.Supp. 1100 (N.D. Ill. 1996). There the court held that; "Procedural due process requires two principal inquiries, first whether plaintiff was deprived of a protected property interest and, second, what process was due with respect to that deprivation." *2; "Whether person has property interest protected by due process is question which is determined by

reference to state law." *3; "Random and unauthorized conduct by state actors violates the due process clause only if there is no adequate post deprivation state law." *8

The District Court's Memorandum Opinion and Order of November 25, 2003, as well as the Court of Appeals' Unpublished Order of December 11, 2003 addressing Petitioner's Section 1981(a) and Section 1982 claims is arguably inconsistent with this Court's analysis test in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). There this court held that; "Substantive law will identify which facts are material for the purpose of summary judgement, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement: factual disputes that are irrelevant or unnecessary will not be counted." *2

As well as is arguably inconsistent with this Court's analysis test in *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). There this court held that; "Regardless of whether the moving party accompanies its summary judgement motion with affidavits, the motion may and should be granted so long as whatever is before the district court demonstrates that the standard for entry of summary judgement set forth in Rule 56(c) is satisfied" *5. The court also held that; "Rule 56 must be construed not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the right of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis." *9

As well as is arguably inconsistent with the Northern District's analysis test in *Harding v. Rosewell,* 22F.Supp.2d 806 (N.D. Ill. 1998). There the court held that; "Genuine

issues of fact exist as to whether employee in county treasurer's office had protectable property interest in his employment precluding summary judgement for county on due process claim asserted by employee following termination." *7

As well as is arguably inconsistent with the Northern District's analysis test in *Sisters of Providence of St Mary Wood v. City of Evanston,* 355 F.Supp. 396 (N.D. Ill. 1971). There the court held that; "summary judgement is rarely, if ever appropriate in civil rights disputes if motivation and intent are important to resolution of issues and never if serious questions of facts remain unresolved."

This court should resolve the conflicts that has arisen between the districts court's Memorandum Opinion and Orders of October 11, 2001; November 25, 2002 and the court of appeals Unpublished Order of December 11, 2003 and various Courts of the Seventh Circuit and this Court over the proper analysis tests for evaluating the sufficiency of a Section 1983 deprivation of rights claims under the Fourteenth Amendment of the Constitution for the United States and over the analysis tests used for allowing summary judgement. Also, this Court should resolve whether such actions of deprivation of post deprivation administrative and judicial proceedings and interference with contractual relationship on the part of Respondent Mezera either were discriminatory and unlawful or were non-discriminatory and lawful. Therefore, the writ ought to be granted.

II. Whether Respondent City's failure to accord Petitioner with the full and equal benefit of the Section 20-6 post deprivation judicial proceedings deprived Petitioner of due process of law as guaranteed under the Fourteenth Amendment of the Constitution of the United States?

The Fourteenth Amendment of the Constitution of the United States, in relevant part, states; **"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."**

Paragraph 4, the policy of Respondent Toso's June 4, 1998 issued Notice of Emergency Condemnation, as codified and as applied, provides a post deprivation administrative hearing process that is due before Respondent City effectuates punitive action against a property owner's property.

And

Section 20-6, the section of the Code of Ordinances for the City of Joliet, as codified and as applied, provides a post deprivation judicial review process that is due before Respondent City can be authorized to initiate any form of punitive action against a property owner for alleged failure to abate a property nuisance within a prescribed period of time after receiving notice to do so.

In this present case, it has been Respondent City's *"customary practice"* to accord property owners whom fail to abate cited property nuisances, the courtesy of being provided with a Section 20-6 post deprivation judicial proceedings in order to acquire Court authorization to conduct punitive action against an alleged ordinance violator. Respondent City never contested Petitioner Phillips' contention of being deprived of the full and equal benefit of the *"customary practice"* of being afforded a Section 20-6 post deprivation judicial proceeding,

as accorded to similarly situated white rental property owners whom were allowed to receive post judicial proceedings to defer punitive action (See R.Doc. 70, Exhibit K1 – K4).

In making its October 31, 2001 determination on Counts III & IV Section 1983 claims and on Count V common law Negligence claim of Petitioner Phillips's Second Amended Complaint. Rather than utilizing the proper analysis tests for determining the nature of due process established by the courts in the matters of *Bordelon v. Chicago School Reform Board of Trustees,* 8 F.Supp.2d 779 (N.D. Ill. 1998); *Chicago School Reform Board of Trustees v. Substance Inc.,* 79 F.Supp.2d 919 (N.D. Ill. 2000); *McKenzie v. City of Chicago* 968 F.Supp. 1268 (N.D. Ill. 1997); *N & N Catering Company, Inc. v. City of Chicago* 26 F.Supp.2d 1067 (N.D. Ill. 1998) and *Qvyjt v. Dr. Chhiu-Tsu Lin,* 932 F.Supp. 1100 (N.D. Ill. 1996), as guide posts for making the determination of October 31, 2001. The district court based its determination on Respondent City's observation that because the City of Joliet is a home-rule municipality as defined by Article VII of the Illinois Constitution, it has the power to legislate concurrently with, and contrary to the State of Illinois. Once the City adopts ordinances contrary to Illinois state statutes, the ordinances prevail unless the General Assembly has preempted a home rule exercise of power, citing *People of the State of Illinois ex rel. Ryan v Village of Hanover Park* 311 Ill.App. 3d 515, 524-25, 724 N.E.2d 132, 138 (1st Dist. 1999); *Demick v. City of Joliet,* 135 F.Supp.2d 921 (N.D.Ill. 2001) as the legal basis for its decision which were not remotely relevant to addressing the issues raised in Petitioner Phillips' Second Amended Complaint (R.Doc. 23).

In *N & N,* the court held that; "The Fourteenth Amendment protects persons from state governmental deprivations of life, liberty or property without due process of law." citing *Pro-Eco*

Inc. v. Board of Communication of Jays County, 57 F.3d 505, 512 (7th Cir. 1995) A procedural due process claim under the Fourteenth Amendment is brought pursuant to 42 U.S.C. Section 1983, and "require[s]" a two-step analysis." Citing *Doherty v. City of Chicago,* 75 F.3d 318, 322 (7th Cir. 1996); *see also Greco v. Guss,* 775 F.2d 161, 170 (7th Cir. 1985). *4

This court should take judicial notice that this Court has repeatedly emphasized that; "The touchstone of due process is the protection of the individual against arbitrary action of government." *Lewis*, 118 S.Ct. at 1716 quoting *Wolf v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed 935 (1974). This due process guarantees protection not only against "the exercising of power without reasonable justification in the service of a legitimate governmental objective", *Lewis,* 118 S.Ct. at 1716 citing e.g. *Daniels v. Williams,* 474 US 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The due process clause specifically protects those fundamental rights and liberties which are objectively, deeply rooted in this Nations history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.

In this present case, Respondent Mezera, acting through Respondent City, did not exercise his power with reasonable justification in the service of a legitimate governmental objective. It has been Respondent City's long standing *"customary practice"*, as codified in its adopted Ordinance i.e., Section 20-6 - to first seek judicial authorization before conducting any form of punitive action to deprive a property owner of his or her property rights. Rather, Respondent Mezera's actions acted out through Respondents Shapard, Toso and Kucharz, were motivated solely by racial animus.

Respondent Mezera chose to disregard according Petitioner Phillips with his requested post deprivation hearing for seeking the withdraw of Respondent Toso's June 4, 1998 issued Notice of Emergency Condemnation and chose to disregard according Petitioner Phillips with the due process of Section 20-6 post deprivation judicial proceedings before authorizing the conducting of punitive action against Plaintiff Phillips – i.e., forcible eviction of the tenants from Petitioner Phillips' former 26-28 Union Street property, unreasonable seizure of Petitioner Phillips' former 26-28 Union Street property and effectuating the termination of Petitioner Phillips' March 2, 1998 renewed U.S. Department of HUD Moderate Rehabilitation Section 8 Housing Contract with the Housing Authority of Joliet.

The due process of the Ordinance [Section 20-6] requires the according of post deprivation judicial proceedings. Since Respondent City failed to comply with its own Ordinance. And since neither did either the district court or the three panel judges of the court of appeals address what form of due process Petitioner Phillips was due under either the policy of paragraph 4 of Respondent City's Notice of Emergency Condemnation or Section 20-6 of the Ordinances of the City of Joliet. Then, the writ ought to be granted.

III. Whether the district court's dismissal of Counts III, IV & V of Petitioner's Second Amended Complaint with prejudice and the decision to grant Summary Judgement on Counts I & II of Petitioner's Second Amended Complaint was improper as a matter of law?

In his Response pleadings to the Respondent City's Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to FRCP Rule 12 (b)(6). Petitioner Phillips argued that according to Section 1356, the section of the Federal Practice and Procedure, which defines the purpose of the Rule 12(b)(6) Motion, in relevant part, states: **"The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of claim for relief; it is not a procedure for resolving a contest about the facts or the merits of the case."** *Peck v. Hoff,* C.A. 8th 1981, 660 F.2d 371, 374, **citing Wright & Miller**; *Murray v. Amoco Oil Company,* C.A.5th, 1976, 539 F.2d 1385 (R.Doc. 27).

In its allowance of Respondent City's Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to FRCP Rule 12(b)(6). The district court did not grant the dismissal based upon an alleged failure on the part of Counts III & IV Section 1983 deprivation of rights claim & Count V common law Negligence claim to sufficiently set forth all of the essential elements necessary for establishing a claim under Title 42 U.S.C. Section 1983 and common law Negligence. Rather, the Memorandum Opinion and Order of October 31, 2001 was based upon conceding to Respondent City claim that; "Because the City of Joliet is a home-rule municipality as defined by Article VII of the Illinois Constitution, it has the power to legislate concurrently with, and contrary to, the State of Illinois. Once the City adopts ordinances contrary to Illinois

State statutes, the ordinance prevails unless the General Assembly has specifically preempted a home rule exercise of power. *See generally People of the State of Illinois ex rel. Ryan v. Village of Hanover Park,* 311 Ill. App. 3d 515, 524-25, 724 N.E.2d 132, 138 (1st Dist. 1999); *Demick v. City of Joliet,* 135 F.Supp. 2d 921 (N.D. Ill. 2001) No such preemption appears in the state statute cited by Plaintiff and therefore if the City has legislated otherwise, it was not necessary for Defendants to obtain a court order." (A-32).

It is important to note that Section 20-6 of the Code of Ordinances of the City of Joliet (R.Doc. 69, Exhibit C) represents the adopted ordinance that Respondent City legislated concurrent with 65 ILCS 5/11-31-1(a) requiring the applying to the circuit court of the county to secure court authorization for punitive action. This fact, the district court misconstrued in its evaluation of the nature of Petitioner Phillips' Counts III & IV Section 1983 deprivation of rights claims (A-2 to 34). Despite the pleadings set forth in Petitioner Phillips' Appeal Reply Brief highlighting the aforementioned. The court of appeal evaded address the district court's over-sight in its Unpublished Order of December 11, 2003 (A-1).

In the matter of *Bordelon v. Chicago School Reform Board Of Trustees,* the court held that; "To succeed in a Section 1983 action, plaintiff must established that the conduct complained of was carried out under the color of state law and that this conduct deprived him of rights, privileges or immunities guaranteed by the Constitution or laws of the United States." *4

Petitioner Phillips argued in his district court pleadings and court of appeals' pleadings that in the matter of *West v. Atkins,* N.C., 108 S.Ct. 2250, 487 U.S. 43 101 L.Ed.2d 40 (1998), this Court held that; "In order to state a claim under Title 42 U.S.C. Section 1983, plaintiff must allege violation of rights secured by the Constitution and laws of the United States and must

show that alleged deprivation was committed by persons acting under color of law."And in the matter of *Kentucky v. Graham, Ky.,* 105 S.Ct. 3099, 473 U.S. 159, 87 L.Ed.2d 114, on remand 781 F.2d 932 (1985), this court held that; "On merit, to establish personal liability of a public official in a Section 1983 action, it is enough to show that the official, acting under color of law, caused the deprivation of a federal right, but more is required in an official capacity action, for the governmental entity is liable under Section 1983 only when the entity itself is a *"moving force"* behind the deprivation."

Rather than reviewing and evaluating the manner in which Respondent Mezera utilized Respondent City as the instrument to serve as a *"moving force"* behind the interference with Petitioner Phillips' contractual relationship with the Housing Authority of Joliet (R.Doc. 70, Exhibit P) and the deprivation of post-deprivation administrative proceedings. As justification for affirming the district court's dismissal of Counts III & IV Section 1983 deprivation of rights claims and Count V common law Negligence claim of Petitioner Phillips' Second Amended Complaint. The court of appeals merely mentioned that the district court's dismissed the due-process counts claiming that because plaintiff's complaint demonstrated that the city gave him notice and an opportunity to be heard, which is all that due process requires" citing *Wainscott v. Henry,* 315, F.3d 844, 852-53 (7th Cir. 2003). *Wainscoti* is not remotely relevant to addressing the proper analysis test to be applied in deciding a Motion brought forth pursuant to FRCP Rule 12(b)(6) directed toward a Section 1983 deprivation of Fourteenth Amendment due process and common law Negligence claim. Because of this conflict the writ should be granted.

Petitioner Phillips argued in his court of appeals' Appeal Brief that in the matter of *Celotex Corporation v. Myrtle Nell Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986), this Court held

that; "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by rule prior to trial, that the claims and defenses have no factual basis." Petitioner Phillips re-argued in his court of appeals Briefs that based upon the failure on the part of the Respondent City's Motion for Summary Judgement and LR56.1(a)(3)(A)(B) Statement of Material Facts to comply with the mandatory pleading requirements of LR56.1(a)(3)(A)(B) and failure show that there was no genuine issue as to any material fact that entitled the Respondent City to judgement as a matter of law. Then such failure constituted grounds for the denial of Respondent City's Motion for Summary Judgement.

It is important to note that the district court yielded from fully addressing the deficiencies set forth in Respondent City's improperly pled LR.56.1(a)(3)(A)(B) Statement of Material Facts (R.Doc. 58), which precluded review by the court of appeals.

In reviewing the pleadings of the Respondent City's improperly pled LR56.1(a)(3)(A)(B) Statement of Material Facts, the district court did not lean on the pleading requirements of either FRCP Rule 56(c) or LR56.1(a)(3)(A)(B) for determining whether or not Respondent City was entitled to Summary Judgement on Count I equal rights under the law claim and Count II property rights claim of Petitioner Phillips' Second Amended Complaint. Rather, in the face of being provided with four illustrated examples of how Respondent City accorded similarly situated white property owners with Section 20-6 post deprivation judicial proceedings (R.Doc. 70, Exhibits K1 –K4) and in the face of being provided with documentary evidence illustrating Respondent Mezera's interference with

Petitioner Phillips' contractual relationship with the Housing Authority of Joliet (R.Doc. 70 @ page 17, paragraph 34, Exhibit R). The district court enter judgement in favor of the Respondents, based on the claim that Petitioner Phillips having had not offered any evidence of intentional discrimination by Joliet officials (A-23). On appeal, Petitioner Phillips pled the summary judgement standards set forth in *Celotex v. Catrett,* 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby Inc.,* U.S. 242, 248 (1986); *Bisciglia v. Kenosha Unified Sch. Dist. No. 1,* 45 F.3d 223, 226 (7th Cir. 1995); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986), as well as pled the failure on the part of Respondent City to disprove any of Petitioner Phillips' LR56.1(b)(3)(B) Statement of Additional Material Facts and the failure on the part of the Respondents' LR.56.1(a)(3)(A)(B) Statement of Material Facts to meet the mandatory pleading requirements of LR56.1(a)(3)(A)(B). Rather than reviewing R.Doc. 69 & 70's pleadings and evidence. The court of appeals claimed that; "The race-discrimination counts were disposed of at summary judgement after Phillips was unable to identify any similarly situated property owners whom the city had treated any better.

Petitioner Phillips reargued in his court of appeals' Brief that, based upon the failure on the part of the Respondent City's LR56.1(a)(3)(A)(B) Statement of Material Facts to meet the basic pleading requirements of Rule 56(c) and LR56.1(a)(3)(A)(B). Then, according to LR56.1(a)(3)(A)(B), such failure constituted grounds for the denial of the motion. Therefore, there did not either exist probable cause or legal justification for the court of appeals to affirm the district court's determination of November 25, 2002.

Petitioner Phillips' district court and court of appeals' pleadings argued the matter of *Sisters of Providence of St. Mary*

of Wood v. City of Evanston, 355 F.Supp. 396 (N.D. Ill 1971), where the district court held that; "Summary Judgement is rarely, if ever appropriate in civil rights disputes if motivation and intent are important to resolution of issues and never if serious questions of facts remain unresolved."

The deprivation of the entitled post administrative hearing for seeking review, modification or withdraw of Respondent City's June 4, 1998 issued Notice of Emergency Condemnation, (R.Doc. 70, Exhibit N) as well as Respondent Mezera's directed interference with Petitioner Phillips' March 2, 1998 renewed U.S. Dept. of HUD Moderate Rehabilitation Housing Section 8 Contract with the Housing Authority of Joliet (R.Doc. 70, Exhibit P), and Respondent City's failure to accord Petitioner Phillips with the due process of Respondent City's Section 20-6 post deprivation judicial proceedings as *"customarily"* accorded to other similarly situated white rental property owners (R.Doc. 70, Exhibits K1 – K4), shows the existence of genuine issues of material facts and unresolved issues. Upon an assiduous review and evaluation of the undisputed pleadings and documentary evidence of R.Doc. 23, 27, 68, 69 & 70, particularly R.Doc. 69 & 70's Exhibits C, E, H, K1-K4, L, M, N & P and paragraph 34 of R.Doc. 69. This Court will see that the First and Second Orders were not based upon utilizing the proper analysis tests for evaluating the conditions under which it is permissible to grant a Motion filed pursuant to FRCP Rule 56(c) and will see that the Third Order evaded addressing and misrepresented numerous material facts set forth in R.Doc. 23 – 27 and that the proper analysis test for evaluating the conditions under which it is permissible to grant a Motion filed pursuant to FRCP Rule 12(b)(6) was not applied to dismissing Petitioner

Phillips' Section 1983 deprivation of due process rights claims. Therefore, the writ ought to be granted.

CONCLUSION

Based upon the aforementioned, the fairest and just determination for this Honorable Court to make, as Guardian of the Law, would be that of granting this Petition for a Writ of Certiorari.

Respectfully submitted

By: _____

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